The government's complaint, filed on April 27, 1961, sought divestiture of Cupples to a person other than an integrated aluminum producer, to assure Cupples' "continued independent operation"; injunctive relief against certain further acquisitions by Alcoa; and "such other and further relief as the Court may deem just and proper."

1. THE COMPANIES INVOLVED

Alcoa, the nation's largest producer of primary aluminum, accounted for 36.1 percent of such production at the time of the acquisition (J.S. 4a). The industry is highly concentrated. In 1960, there were only six domestic producers of primary aluminum, three of which (Alcoa, Reynolds Metals Company and Kaiser Aluminum & Chemical Corporation) accounted for nearly 85 percent of the nation's production (J.S. 3a). See *United States* v. *Aluminum Company of America,* 377 U.S. 271, 277–278. Prior to the acquisition, Alcoa had 26 fabricating facilities throughout the United States, but none of these produced aluminum curtain wall or windows, the principal business of the acquired company (J.S. 5a). Curtain wall is a non-load bearing wall attached to the structural framework of a building. It is designed to keep out the elements and to enable light to enter the building, and is generally composed of panels and window sections (J.S. 5, n. 3).

Cupples is engaged in the fabrication of aluminum curtain wall, aluminum windows and other aluminum products. At the time of the acquisition, its annual

sales were about $14 million, of which about $6½ million were of curtain wall (J.S. 6a). Cupples was the largest fabricator of aluminum curtain wall in the country, with 16.6 percent of the national output.[1]

At the time of the acquisition, Cupples owned and operated fabricating facilities in St. Louis, Missouri, and Dowagiac, Michigan, and had plans to construct a plant on the West Coast (J.S. 3a, 6a). After the merger, Alcoa invested more than $1.5 million in Cupples' existing plants, and financed the building of a $2.8 million fabricating plant for Cupples in Corona, California (J.S. 7, 6a).

In 1962, approximately a year after it filed the complaint, the government sought a preliminary injunction against any further construction of the Corona plant. The district court found that Cupples had designed and was supervising construction of the Corona plant for Alcoa, and that Alcoa's "decision that the West Coast plant should be clearly identified as an Alcoa plant and that Alcoa would finance the plant and would hold the title to the plant through Gateway Properties, Inc., its wholly-owned subsidiary, created for that purpose, was made in view of the risk that if it were a Cupples-owned and financed plant and if the acquisition of Cupples is determined a violation of § 7 of the Clayton Act and divestiture decreed, the West Coast plant would be

[1] The 11 largest aluminum curtain wall fabricators produced 65.3 percent of the 1957 industry total; Cupples accounted for more than 25 percent of the production of those 11 firms (J.S. 16a).

subject to divestment" (R. V 675).[2] Although the court refused to enjoin any further construction and permitted Alcoa to retain title to the Corona plant *pendente lite,* it required that "this plant shall be operated by Cupples and the products made therein shall be Cupples products and shall be sold and advertised as Cupples products (R. V 686).[3] At the time of the decision below, Cupples was fabricating aluminum curtain wall and windows at St. Louis, Dowagiac and Corona (J.S. 6a).

2. THE DECISION OF THE DISTRCT COURT

After trial, the district court held that the acquisition violated Section 7 of the Clayton Act because

[2] Appellants have indexed the record as follows: Volumes I through XII contain pleadings, motions and stipulations prior to trial; Volumes XIII and XIV contain the hearings on relief; Volume XV contains the papers relating to the docketing of the appeal in this Court and the district court order permitting closing of the Corona plant. The pages are numbered consecutively beginning with the government's complaint (Volume I, pp. 1–9) through the order authorizing Corona to be closed (Volume XV, pp. 3190–3191). Volumes XVI through XXXVI contain the transcript of the trial. "R.—" refers to the above pagination of the record on file in this Court, the roman numeral indicating the volume.

[3] The quotations are from the memorandum opinion and order of Judge Meredith, entered on July 30, 1962. The court's order (R. V 685–686) also enjoined Alcoa and Cupples from commingling or consolidating any of their operations, assets, pension plans, employees, etc. On April 16, 1965, upon Alcoa's motion asserting that there were continued and increasing losses from the Corona plant, the order was modified to permit closing of the Corona plant, provided that Alcoa maintain the plant "in good condition capable of being reactivated promptly" (R. XV 3191).

of its impact upon competition in two lines of commerce: "metal curtain wall" and "aluminum curtain wall."[4] The court found that Alcoa's "avowed purpose" in acquiring Cupples was to obtain 40 percent of the aluminum curtain wall business; that Alcoa has the power to increase Cupples' share of the market from 16.6 percent to 40 percent (J.S. 17a–18a); and that Alcoa would achieve that—or a greater—share of the market if it retained Cupples, because of various economic advantages arising from Alcoa's position as a primary producer and its financial strength (J.S. 18a–20). The court found that such a development would mean elimination of some of the small companies as competitors of Cupples in the aluminum curtain wall business and would render it more difficult for larger companies to compete effectively (J.S. 18a). Accordingly, the court held that the acquisition of "the number one fabricator of aluminum curtain wall" by "the number one domestic producer," with the above-stated purpose, "can reasonably be expected to substantially lessen competition or tend to create a monopoly in the fabrication and sale of metal curtain wall and aluminum curtain wall, the relevant lines of commerce within

[4] The court found that curtain wall was the broad product market and that, within those outer boundaries, metal curtain wall and aluminum curtain wall were "meaningful product markets or 'lines of commerce'" (J.S. 8a–15a). It also found, as the parties had agreed, that the entire United States was the relevant market (J.S. 8a). The court held that the government had not met its burden of proving that metal or aluminum nonresidential windows constituted lines of commerce (J.S. 24a).

the United States" (J.S. 22a–23a). The court concluded (J.S. 24a):

> Alcoa will be ordered to divest itself of the stock of Cupples. Because of the ownership of the Corona, California, plant by Alcoa, which is being operated by Cupples, a further hearing will be held to determine the proper method and the scope of the divestiture.

3. THE DIVESTITURE PROCEEDINGS

After rendering its opinion, the district court conducted hearings to determine whether to order divestiture of the Corona plant. The government proposed that Alcoa should transfer the Corona plant to Cupples, and then divest itself of the Cupples stock. It urged that a prospective purchaser of Cupples might want the Corona plant, and that the Corona plant was a "fruit of the acquisition" (R. XIII, 2802–2803, 2839, 2864, 2885; R. XIV 3130–3137). Alcoa asserted that it should be permitted to retain the Corona plant. The president of Cupples testified that the Corona plant was not an economic success and would not be desirable as part of a divested Cupples (R. XIV 3017, 3028).

On December 4, 1964 the court entered a final judgment requiring Alcoa to divest (1) "all right, title and interest in the assets (including all the real estate) which are located at Corona, California, and which have been operated by defendant Cupples" and (2) "all ownership of the stock, share capital, assets, tangible and intangible, and other interest it may have in defendant Cupples" (J.S. 24a–25a).

ARGUMENT

Appellants do not challenge the district court's rulings that Alcoa's acquisition of Cupples was illegal and that divestiture is the appropriate remedy. They contend only that the district court should not have ordered Alcoa to divest, in addition to the Cupples stock, the Corona fabricating plant, which it built for Cupples after the acquisition. We submit that the district court correctly required Alcoa to divest the Corona plant, and that this narrow issue as to the scope of the divestiture order in this case does not warrant plenary consideration by this Court.

1. Contrary to appellants' contention (J.S. 11–12, 17), the judgment does not give Alcoa a free choice between divesting the Corona plant separately or as part of the Cupples operation. On the contrary, it requires Alcoa initially to offer all three plants for sale and to permit a purchaser, if he wishes, to acquire as a going concern all the facilities that Cupples had while Alcoa owned it.

Paragraph 2 of the judgment provides (J.S. 24a–25a):

> Within one year from the date of the entry of this final judgment defendant Alcoa shall:
>
> (1) divest itself of all right, title and interest in the assets (including all the real estate) which are located at Corona, California, and which have been operated by defendant Cupples; and
>
> (2) divest itself of all ownership of the stock, share capital, assets, tangible and intangible, and other interest it may have in defendant Cupples;

Paragraph 3 of the judgment directs Alcoa within 60 days to submit a detailed plan setting forth the manner in which "Alcoa proposes to accomplish the divestiture ordered in paragraph 2 hereof" (J.S. 25a). Paragraph 4 provides that "the divestiture ordered in paragraph 2 hereof shall be made in good faith as a going business" and subject to certain conditions (*ibid*).

In short, the decree aims at reconstituting Cupples "as a going business" and it contemplates that divestiture of the plant at Corona which Alcoa built, as well as of the stock of Cupples which Alcoa owns, may be essential to achieve such result. The fact that the court rejected the government's proposal that Alcoa should be required first to transfer the Corona plant to Cupples and then to divest the Cupples stock, does not show that the court intended to give Alcoa complete discretion to decide whether to divest the Corona plant separately from the Cupples stock. The court so acted after Cupples' president testified that in his view the Corona plant was not presently economically desirable for Cupples. In these circumstances, and in view of the other provisions in the judgment which refer to "the divestiture" ordered in paragraph 2, the court's rejection of the government's suggestion would appear to involve no more than a decision to give a prospective purchaser the freedom to buy the Cupples stock with the Corona plant or without it.

Requiring Alcoa to offer the three Cupples plants initially as a single unit is important to accomplish a divestiture that will restore to the industry the com-

petition that was eliminated by the Cupples acquisition. As we discuss below, the record shows and the district court found that the Corona plant was built and intended to be used as an integral part of the Cupples business. Although the plant has now been shut down, it does not follow that a prospective purchaser of Cupples would not want the option of acquiring the plant together with the two other plants that Cupples presently is operating. Indeed, at the time of the acquisition Cupples itself had plans to construct a plant on the West Coast, and a prospective purchaser might well consider an existing facility in that area to be an important asset of the Cupples business. Furthermore, prospective purchasers might be reluctant to buy Cupples if they knew that Alcoa still retained the Corona plant, which was constructed with Cupples know-how and which Alcoa might use in competing against them in the fabricating business. Even assuming that Alcoa were enjoined from using the Corona plant for making curtain wall and/or related products, the potential for inflicting competitive injury that this plant represented as long as it remained in the hands of Alcoa might chill the interest of prospective purchasers of Cupples.

Of course, it may be that no prospective purchaser of Cupples would want the Corona plant, or would be willing to buy Cupples if he also had to take that plant. If that ultimately should be the case, Alcoa could then of course dispose of the Corona plant separately or it could seek modification of the judgment to permit it to retain the Corona plant subject to suit-

able restrictions upon its use that would adequately protect an independent Cupples. The Department and the district court would consider the problem in the light of the conditions then existing. But at the present time, when the process of divestiture is just getting under way, the most effective method of accomplishing divestiture—a step whose appropriateness Alcoa does not challenge—obviously is to give prospective purchasers the option of acquiring all three Cupples plants. That is precisely the opportunity that the divestiture order of the district court provides.

Further support for this obviously sensible inclusion of the Corona plant in the order of divestiture is furnished by the settled principle that antitrust violators may be deprived of the fruits of their illegal conduct. The district court's findings and the supporting evidence fully establish that the Corona plant was one of the "fruits" of Alcoa's acquisition of Cupples.

a. There is no significant disagreement as to the relevant facts on this issue. Alcoa paid for the construction of the Corona plant and took legal title to the land and equipment. Alcoa concedes (J.S. 7) that the Corona plant "was built to enable Cupples to serve the West Coast market," that "Cupples' personnel laid out the plant and supervised its construction," and that Cupples' employees were transferred "to provide a nucleus for the Corona operating staff." The district court so found in its memorandum on interlocutory relief (R. V 669–684) and the president of Cupples, Charles C. Moran, so testified at the hearing on the scope of divestiture.[5] At the

[5] Mr. Moran testified that prior to construction of Corona, Cupples was unable to compete effectively in the sale of curtain

hearing below, Alcoa's counsel admitted that the "chances are" that Alcoa would not have built the plant had it not been for the acquisition of Cupples (R. XIII 2875).

The fact that the Corona plant was intended to be a Cupples operation is not negated by Alcoa's financing or retention of title. Alcoa also made expenditures for additions and improvements to Cupples' facilities in St. Louis and Dowagiac, the divestiture of which it does not challenge. As to title, the district court explicitly found (in granting interlocutory relief) that Alcoa had intended to lease the plant to Cupples and that it retained title only to avoid the "risk" that the plant "would be subject to divestment" as a part of Cupples (R. V 675, quoted *supra*, pp. 3–4).

The court's findings were solidly supported by the appellants' own evidence at the 1962 hearing on interlocutory relief. Affidavits of Mr. Moran, Cupples' president, and of M. M. Anderson, Alcoa's executive

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wall on the West Coast because shipping costs were prohibitive (R. XIV 3025); that the company would have built a curtain wall fabricating plant on the West Coast had it not been for the acquisition (R. XIV 3016); that Cupples selected the Los Angeles area as the general location for the new plant (R. XIV 3049); that Alcoa requested Cupples' concurrence in the choice of Corona, California as the specific site (R. XIV 3017–3018); and that Cupples contracted to supervise the construction, layout and installation of machinery at Corona (R. XIV 3019). The hearing also disclosed that 29 employees from Cupples' St. Louis plants, including several employees who formed the "nucleus of the then existing Cupples organization" (R. XIV 2990), were transferred to Corona to supervise construction, engineering, production and sales at the new facility (R. XIV 2984–2985).

vice president, showed that the Corona plant was intended to be an integral part of the Cupples' operation. Moran stated that:

> While title to the [Corona] facility is vested in Gateway [an Alcoa subsidiary], it is and has been my understanding that upon completion the plant will be leased to Cupples and operated and known as a Cupples facility. All products to be fabricated at the West Coast plant will be sold by the Cupples sales organization under the same name and in the same manner as products now made in the Cupples plants in St. Louis, Dowagiac * * *. In short, business done at or through the West Coast plants will be Cupples business. All personnel who will staff and operate the West Coast plant will be Cupples employees and will remain on the Cupples payroll. [R. II 309–A.]

Mr. Anderson expressed Alcoa's agreement with Moran's understanding:

> The management and operation of these facilities will be completely in the hands of the officers and employees of Cupples. The products fabricated at the plant will be sold by the Cupples sales organization under the Cupples name and for its own account, the same as are products of the Cupples plants in St. Louis, Dowagiac * * *. All customers served by the facilities in Corona will be customers of Cupples. [R. II 309–F.]

Anderson's affidavit also explained why Alcoa had retained title to the plant:

> In view of the pendency of this litigation and the risk that, if the Government succeeded in

> having Alcoa's acquisition of the capital stock of Cupples declared to be a violation of Section 7 of the Clayton Act, this Court might possibly require Alcoa to divest itself of the stock of Cupples, prudent business discretion required that the new and separate facility to be built at the Corona site, to be financed by Alcoa, not be brought within Cupples' ownership so as to subject it to the possibility of divestiture. Accordingly, it was decided that the West Coast plant should be clearly identified as the property of Alcoa. [*Ibid.*]

Thus, Alcoa sought to gain a commanding position in the curtain wall business through acquisition of Cupples, and it believed that one method of assuring continued participation in the industry, even if it were later ordered to divest its interest in Cupples' other facilities, would be to retain title to the new curtain wall plant.[6] In these circumstances, we submit that Alcoa's development and ownership of the Corona plant was plainly attributable to, and resulted from, the acquisition of Cupples. It was one of the "fruits" of the illegal acquisition (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 152, 172). Divestiture of Corona is necessary since Alcoa "should,

[6] The record shows that Alcoa at one time contemplated the possibility of taking title to the building extensions and equipment at the St. Louis and Dowagiac facilities "in view of possible divestiture proceeding" (GX 57). However, accounting considerations caused Alcoa to discard this possibility (*ibid.*) and as a result ownership of the additions and improvements was vested in Cupples. Thus had it not been for practical considerations, Alcoa would have attempted to avoid an order requiring any divestiture whatever of its investment in Cupples' assets.

so far as practicable, be denied future benefits from [its] forbidden conduct" (*United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, 89).

b. Alcoa contends (J.S. 18), however, that the Corona plant should not be considered a "fruit" of the acquisition, since it is an ordinary aluminum fabricating plant similar to others Alcoa has built and could have been constructed without Cupples' aid. But the fact is that it was not so constructed. Corona was built under Cupples' supervision for the purpose of use in Cupples' line of business as part of the Cupples firm—in short, it was plainly a result of the acquisition. Moreover, there seems little doubt that the plant embodies Cupples know-how, at least in layout and design (as distinguished from particular items of machinery). The value of this know-how is shown by Alcoa's desire to acquire and use it; by the evidence that several firms had sought to enter the curtain wall business and failed because of lack of know-how (R. XIV 3079–3082);[7] and by Moran's testimony indicating that other aluminum fabricating plants are not immediately adaptable to production of curtain wall.[8] Alcoa's original purpose in retaining Corona, as a means of staying in the

[7] Among the companies that failed was Reynolds Metals Company (R. XIV 3081, 3082), the country's second largest primary aluminum producer (J.S. 3a).

[8] Moran testified that Alcoa's New Kensington, Pennsylvania, fabricating facility could be adapted to curtain wall production in "two months" although curtain wall could not be manufactured as "efficiently" at New Kensington as it is at Cupples' St. Louis curtain wall plant (R. XIV 3046).

curtain wall business, is the surest confirmation that Corona is not interchangeable with Alcoa's 26 other fabricating plants.

2. Alcoa further contends (J.S. 19–21) that divestiture is unnecessary and punitive because any anticompetitive effects resulting from Alcoa's acquisition of Cupples' know-how can be cured by an injunction limiting Alcoa's use of the Corona plant. The short answer is that no injunction, however broad in scope, will or can provide as effective relief as divestiture of the Cupples' portion of the business.[9]

As we have shown, the decree properly requires Alcoa to give prospective purchasers of Cupples the opportunity also to acquire the Corona plant because

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[9] While Alcoa now suggests the possibility of an injunction prohibiting it from fabricating at Corona any of the principal products manufactured by Cupples, in the district court it proposed only an injunction against making curtain wall, but permitting it to make windows and other Cupples products. Alcoa there urged that any potential anticompetitive effects could be cured by an injunction prohibiting it "from using the Corona plant in the aluminum curtain wall line of commerce" (J.S. 20). There is no doubt that, on the record before him, Judge Meredith was correct in rejecting this injunction alternative. It is by no means unusual for antitrust judgments to go beyond the strict confines of the proved violation in order to assure effective relief (see *United States* v. *United States Gypsum Co.*, 340 U.S. at 88–89). This was especially true here, because of the close relationship between fabrication of curtain wall and of windows. Curtain wall is ordinarily composed of panels and window sections; Cupples and other firms entered the curtain wall business through the fabrication of windows (J.S. 5a–6a; R. XIV 3073, 3096). An injunction barring manufacture of curtain wall, but permitting manufacture of windows, would be very difficult to enforce. Cf. *United States* v. *du Pont & Co.*, 366 U.S. 316, *infra*.

that may be important to the sale and reconstitution of the Cupples business as an independent enterprise. An injunction against Alcoa's use of the plant to manufacture certain products which Cupples now produces obviously would not in any way further that purpose—although it would, of course, prevent Alcoa from gaining certain competitive advantages from the illegal acquisition. Moreover, such an injunction would involve the difficult problems of policing Alcoa's use of the Corona plant to insure that it was observing the limitations therein provided—a step that "would probably involve the courts and the Government in regulation of private affairs more deeply than the administration of a simple order of divestiture" (*United States* v. *du Pont & Co.*, 366 U.S. at 334). Here, as in *du Pont* (*ibid.*), "the public is entitled to the surer, cleaner remedy of divestiture." Finally, Alcoa cannot show how it would be injured by being required to sell the Corona plant at its market value.

3. The fact that the district court did not make any findings in connection with its decision to require Alcoa to divest the Corona plant does not vitiate that decision. While it is the better practice for a district court to make findings explaining the basis of the relief granted, we think that, in view of the extremely narrow issue presented to the district court, the lack of such findings here does not constitute reversible error. The sole issue that the district court had to decide was whether effective divestiture of Cupples could surely be achieved without also requiring dives-

titure of the Corona plant, and after conducting two hearings on this question the court concluded that the broader order of divestiture was required. We have set forth above the reasons why this conclusion was justified. The absence of findings of fact is not a fatal defect on appeal if the facts are undisputed (*Yanish* v. *Barber,* 232 F. 2d 939 (C.A. 9); *Douds* v. *Local 1250, Retail Wholesale Dept. Store Union,* 170 F. 2d 695 (C.A. 2)), and their absence will be overlooked "if a full understanding of the issues could be reached without the aid of findings, even though such findings would have been helpful" (*Urbain* v. *Knapp Brothers Manufacturing Co.,* 217 F. 2d 810, 816 (C.A. 6), certiorari denied, 349 U.S. 930). While this Court frequently has examined a decree "in light of the record" to determine its adequacy (*United States* v. *Loew's Inc.,* 371 U.S. 38, 52), we know of no case in which the lack of findings as to the reasons for the relief granted has precluded the court from testing its propriety. See, *e.g., Md. & Va. Milk Producers Assn.* v. *United States,* 362 U.S. 458, 472–473, and particularly the opinion and decree in that case, No. 62, O.T., 1959, R. 84–87, 480–496, 504–507.

As we have shown, the record in the present case fully supports the district court's conclusion that, in order to cure the violation shown by the record, Alcoa was required to divest the Corona plant, and this conclusion is not undermined because of the district court's failure to make findings of fact which articulate the precise basis therefor.

CONCLUSION

For the foregoing reasons we submit that the decision below is correct and that the appeal presents no substantial question warranting plenary review by this Court. The judgment of the district court should be affirmed.

Respectfully submitted.

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